UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES NEW YORK OFFICE

COLART AMERICAS, INC. and
STAFF MANAGEMENT GROUP, LLC,
JOINT EMPLOYERS

and Case 22–CA–252829

JOHN HARGROVE, an Individual

Nancy Slahetka, Esq. of Newark, New Jersey,
for the General Counsel.
Sean Darke, Esq., of Chicago, Illinois,
for the Respondent Colart Americas, Inc.
Steven Harz, Esq., of Hackensack, New Jersey,
for the Respondent Staff Management Group, LLC.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried remotely in a video hearing on April 20 and 21, 2021, pursuant to a complaint issued by Region 22 of the National Labor Relations Board (NLRB) on July 1, 2020.

The complaint alleges that Respondents Colart Americas, Inc. (Colart) and Staff Management Group, LLC (SMG) are joint employers when 1) on about December 2, 2019, Respondents threatened employees at the Colart's Piscataway, New Jersey facility with unspecified reprisals if they discussed concerns about work assignments; and 2) on about December 2, 2019, Respondents discharged John Hargrove from his position at the Colart's Piscataway, New Jersey facility for concertedly complaining to Respondent Colart regarding the wages, hours and working conditions of Respondents' employees and for threatening to file a charge with the National Labor Relations Board about the removal of chairs from the workstations and other mistreatment of employees by the supervisors.[1]

The complaint alleges by the conduct described above, 1) the Respondents discharged John Hargrove from his position at Colart because he concertedly complained to Colart regarding wages, hours, and working conditions of Colart's employees in violation of Section 8(a)(1) of the Act; 2) the Respondents discharged John Hargrove from his position at Colart because he threatened to file a charge with the Labor Board in violation of Section 8(a)(4) and (1); and, 3) the Respondents interfered with, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act (Act) in violation of

[1] All dates are in 2019 unless otherwise noted.

Section 8(a)(1) of the Act. The Respondents Colart and SMG filed separate timely answers to the complaint denying the material allegations in the complaint (GC Exh. 1(h); (j) and (k)).[2]

On the entire record, including my assessment of the witnesses' credibility[3] and my observations of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the General Counsel and the Respondents, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent Colart, a domestic corporation, with an office and place of business located at 2 Corporate Place, South, Piscataway, New Jersey, is engaged in the manufacture, non-retail sale, and retail sale of art materials. During the calendar year ending December 31, 2019, Respondent Colart has sold and shipped from its Piscataway facility goods valued in excess of $50,000 directly to points outside the State of New Jersey (GC Exh. 1(h) pars. 4 and 5). The Respondent Colart admits in its answer to par. 4 of the complaint that it is a New Jersey corporation. Colart also admits to par. 5 of the complaint that its Piscataway, New Jersey facility sold and shipped goods valued in excess of $50,000 directly to points outside of the State of New Jersey in its answer to the complaint (GC Exh. 1(k)). As such, I find, that the Respondent Colart is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent SMG is a limited liability company with an office and place of business at 314 Campus Drive, Edison, New Jersey, and has been engaged in the business of providing temporary staffing services to businesses engaged in the distribution, assembly, manufacturing, and production. During the calendar year ending December 31, 2019, Respondent SMG has performed services valued in excess of $50,000 in States other than the State of New Jersey (GC Exh. 1(h) pars. 7 and 8). Respondent SMG admits in its answer to pars. 7 and 8 in the complaint. As such, I find that the Respondent SMG is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

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[2] The exhibits for the General Counsel are identified as "GC Exh." and the Respondents' exhibits are identified as "RColart Exh." for Respondent Colart" and 'RSMG Exh." for Respondent SMG. Joint exhibits have been identified as "Jt. Exh." The posthearing brief of the General Counsel is identified as "GC Br." and the Respondents as "R. Colart Br" for Respondent Colart and "R. SMG Br." for Respondent SMG. The hearing transcript is referenced as "Tr."

[3] Witnesses testifying at the hearing included Carlos Trejo, Isiah Holmes, John Hargrove, Henna Patel, Michael Sandak, and Laurie Herrera. Trejo and Holmes testified as adverse witnesses for the Acting General Counsel and on behalf of Respondent Colart.

II. ALLEGED UNFAIR LABOR PRACTICES

a. The relationship between Respondents Colart and SMG

During the relevant period of time, Respondent Colart had a distribution center in Piscataway, New Jersey. The distribution center receives incoming goods and ships goods outbound to various retail establishments. Colart is an art material company and provides mainly art supplies and products to various retail customers and consumers. At the Piscataway distribution center, Colart employed 37 employees and 30 temporary workers during the relevant November and December 2019 time frame.[4] The distribution center had two job shifts, from 7 a.m. to 3:30 pm. and 3:30 p.m. to 12 midnight (Tr. 22, 23).

The Respondent SMG is an employment staffing agency that recruits employees to work for clients in various employment markets. One of SMG's client at the time was Respondent Colart. SMG and Colart entered into a service agreement in November 2017. The agreement provided workers for Colart's distribution center. The rate of pay was negotiated between the parties, but it is clear from the agreement that SMG paid the wages at the agreed upon rate. SMG also provide its employees with benefits and withhold payroll taxes, maintain unemployment insurance, health insurance, and workers' compensation insurance (Jt. Exh. 1; GC Exh. 12).

Under the service agreement, SMG recruits, screen, interview, hire, and assign its employees to perform work. The supervision of the recruited workers at Colart is performed by Colart. Colart is responsible for properly directing and supervising the assigned SMG employees in the performance of their work. However, any changes in an assigned employee's job duties at Colart must be approved by SMG. Colart, as a client, does not provide and the workers are not entitled to, vacations, holidays, disability benefits, pensions, retirement plans, and other employment benefits that is offered or provided by Colart to its own employees. Under the service agreement, Colart agreed to keep SMG employees on assignment for a minimum of 600 hours (Jt. Exh. 1).

Michael Sandak (Sandak) testified that he has been the president of Respondent SMG for the past 2 years and the executive vice president prior to that time. Sandak testified that he deals with all clients that were recruited by his sales representatives and reviews the new companies before sending employees to work for the client companies. He also ensures that SMG managers work closely with the client companies and oversees the site location by visiting them on a weekly basis. Sandak stated that he is aware that Colart is one of SMG's client companies (Tr. 317, 318).

Sandak testified that wages and benefits are paid to the employees recruited and hired by SMG to work with the client companies. Sandak denied that Colart pays the wages of SMG employees (Tr. 319). Sandak testified that SMG determines the pay rates and would inform

[4] Permanent employees and temporary workers are often collectively referred as "associates" by SMG and Colart.

Colart and other clients the amount needed to pay SMG workers. Sandak maintained that Colart exercises no control over the wages paid or benefits provided to SMG employees and SMG would not do business with a company that did not agree to the wages asked by SMG (Tr. 319–322; Jt. Exh. 1). Sandak noted that if a client wants to pay a SMG employee a higher wage than the going rate, SMG will negotiate with the client and that it is not necessarily so that the client pays for the higher wage rate (Tr. 325, 326, 329).

Sandak further testified that client companies, including Colart, does not determine who is hired or not hired by SMG. Sandak stated that a company may recommend the hiring of an employee, but SMG would still go through the recruitment and requirement process with that potential employee. SMG would then inform the client company if that individual had been hired by SMG and whether the worker is a good fit for the client. Similarly, Sandak stated that Colart or any other client have no authority to terminate a SMG employee. Colart only has the authority to end an associate's assignment if that individual is not a good fit due to work performance or personality conflicts with the client company. In that situation, Sandak testified that the associate is not terminated by SMG but would be reassigned to another client company where the worker may be a better fit. Sandak testified that, "John Doe might not be good fit at Company A, but Company B could be a perfect fit" (Tr. 323–325).

b. The employment of John Hargrove

John Hargrove (Hargrove) testified that he was hired by a staffing agency named On Target Staff and started working at the Colart's distribution center on about August 19. Hargrove reported to the Warehouse Supervisor, Isaiah Holmes, who informed him on about August 21 to work for Respondent SMG because SMG had better benefits and wages than On Target Staff. Hargrove testified that he followed Holmes' suggestion and applied to SMG. SMG hired Hargrove and was placed to work at the Colart warehouse. It seemed that Hargrove's transition from On Target Staff to SMG had no lapse of employment (Tr. 123–127).

Isaiah Holmes (Holmes) testified that he was the lead warehouse supervisor on the 7 a.m. to 3:30 p.m. work shift in November and December 2019 and was responsible for observing the daily operations of workers picking, packing, and shipping orders at the distribution center (Tr. 50, 51). He has been a lead warehouse supervisor for over 6 year (Tr. 235). Holmes reported directly to Carlos Trejo (Trejo) (Tr. 23). Trejo was the distribution center manager at the time and started his position on November 14. Trejo was responsible for the overall distribution and operations at the center (Tr. 21, 22, 283).

Holmes testified that Colart had used several staffing agencies in 2019, including On Target, SMG, Tower, Exec Flow, and others. He stated that Colart would email several staffing agencies if temporary workers were needed and whichever agency responded first would receive the staffing contract. Holmes recalled sending an email to Laurie Herrera at SMG for packers and UPS processors. The announcement for the position noted that the individual must be able to lift up to 50 pounds (Tr. 240–242; RColart. Exh. 1). Holmes recalled that Hargrove was an On Target Staff referral working for several months prior to August 2019, at the Respondent Colart's old building. Holmes stated that Colart stopped using On Target in August and told

Hargrove on about August 19 to reapply for the Colart job through Respondent SMG. Holmes stated to Hargrove that he would be making more money with SMG. Holmes testified he had no problems with Hargrove's work performance in August (Tr. 62–64). Trejo testified that Colart had approximately 30 temporary workers at the time (Tr. 22).

Holmes testified that he oversees the supervisors who are responsible for overseeing that the specific items are properly filled in an order. The inventory of items in an order is then given to a packer to "pack" the items in a box for shipping. Finally, another employee is assigned to ship the order. Holmes testified that he oversees four supervisors during his shift (Tr. 50–53).[5] Holmes stated that each supervisor was responsible for a select department and oversees the employees in that department. Holmes said that Supervisor Lesbia Cardona was responsible for the conveyor department with approximately 10–15 employees involved in picking out small items and packing them in boxes, which included the UPS processors responsible for placing address labels on the packed boxes (Tr. 53, 54). Holmes testified that there were four UPS processors in November and December, to include Hargrove, Lisa Hush, Dempsey James, and Marth Orellana (Tr. 54, 55). Holmes stated that Cardona was the supervisor for the UPS processors, which included Hargrove (Tr. 237).

As one of the designated UPS processors at Colart, Hargrove was assigned to scan and label boxes with shipping addresses for UPS deliveries. Once the boxes were properly labeled, Hargrove would place the boxes on a pallet for shipment. The individual pallets are placed on a plastic wrapping machine that would automatically wrap the pallets in plastic (RColart Exh. 3). Hargrove stated that the pallets may consist of 50 to 60 boxes that he would stack up. However, the number of boxes may only be four to six boxes after they are wrapped and ready for the UPS driver (Tr. 185, 186).

Holmes stated that the processors would work two at a workstation. There was a conveyor that would deliver the boxes. The boxes were placed on the UPS scale, an address label was generated by the processor and placed on the boxes. The labeled boxes would be placed on a pallet for the UPS driver to pick up later in the afternoon. Holmes stated that the entire process should take less than a minute (Tr. 244).

Hargrove said that the pallets are placed on and off the wrapping machine with a power jack. Some of the boxes weighed over 50 pounds. Hargrove worked from 7 a.m. to 3:30 p.m. from Monday to Friday. His assignment and work schedule was provided by Holmes. Hargrove testified that he worked with Lisa Hush (Hush)[6] at their workstation (RColart Exh. 3). He said that Hush was also responsible for labeling and shipping orders through UPS and other shippers (Tr. 129, 130). Hargrove said that if there is a work related problem, he or Hush would report the issue to Holmes (Tr. 135).

[5] Holmes identified his supervisors as "Lesbia" Cardona, "Andrew" (Carter) "Barry" (Lopez) and "Brian" (Babeski). Holmes was unsure of an individual named "Alex" being a supervisor at the relevant time of this complaint (Tr. 53; 235, 236).

[6] Lisa Hush was a permanent Colart employee (Tr. 55, 56).

Holmes testified that Lesbia Cardona and Brian Babeski were the supervisors on Hargrove's shift. Babeski was responsible for all the first shift pickers and employees involved in replenishing stock. Babeski supervised approximately 6 or 7 other workers, including Henna Patel (Patel) at that time (Tr. 57, 58). Holmes testified that Patel was the lead packer for orders shipped to Michael's (an art supply retail store) and reported directly to Babeski. Holmes testified there were 3 leads on the first shift. All the leads reported to Babeski. Babeski or another supervisor would assign the work to the leads and, in turn, the leads would distribute the assignments to the workers (Tr. 60). On occasions, there may be reassignments of the work among the processors and pickers, who are informed during the morning meetings of changes in their work assignments (Tr. 61). Holmes testified that he recalled Colart had 3 UPS processors during the summer and fall. He mentioned Hargrove, Lisa Hush, Dempsey James and an additional person, Marth Orellana, who was in-training (Tr. 54, 55).

Hargrove maintained he had a discussion with Holmes in October about becoming a permanent Colart employee. He said no one else was present during this discussion, which was held in Holmes' office. Hargrove said he was given a Code of Conduct by Holmes as to what is expected of a Colart employee. He asked Hargrove to sign the conduct code document, which he did. Hargrove said the conversation lasted about 10 minutes (Tr. 135, 136).

Holmes testified that Hargrove was a temporary worker and reassignment to a permanent position is optional depending on the work and hours. Holmes indicated that a temporary worker has to work a certain number of hours under the staffing agency contract before being converted to a permanent Colart employee. Holmes specifically noted that Colart does not guarantee conversion from a temporary to a permanent position. Holmes explained that a staffing agency may have a 500-hour contract with Colart and a worker could work beyond the 500 hours and still be a temporary. He stated that other factors for conversion would include the worker's job performance, the number of workers already employed at Colart and whether more employees would be required (Tr. 63–66). Holmes recall discussing the manner in which Hargrove could convert into a permanent position with Colart. Holmes testified that none of the temporary associates continued working at Colart after December 2019, and none were hired as permanent workers (Tr. 64–66).

c. Hargrove work-related problems with Henna Patel

Hargrove testified that another coworker, who was not a supervisor, but a lead employee named "Henna" was responsible for orders designated for the vendor, Michael's (a retail company) but would also bring orders to him and Lisa Hush to make sure that the boxes go out on time.[7] Hargrove said that Patel did not process UPS orders but did pack the items in the boxes for shipping (Tr. 131, 132). Hargrove understood that Patel was a lead and testified (Tr. 134, 194):

> My understanding is that the lead packer is capable of taking the order, understanding what it's going to take to get the order shipped as soon as possible. And he can inform the warehouse workers that are assigned to help him, he can tell them what to do without having to, you know, go to any supervisors or waste any time, he can just get right to it.

[7] As noted above, Henna was identified by Holmes as Henna Patel.

Hargrove testified that he complained in early October that he was not paid at the end of the work week. Associates were paid on a weekly basis by SMG. He said that he had signed in a log book every day and gave the hours worked to Patel to verify. Hargrove said he was not paid for the week ending October 4 (Friday). Hargrove complained to SMG that he did not get paid. He said he contacted Laurie Herrera from SMG. According to Hargrove, Herrera said she would investigate and texted Hargrove that there were no records from Colart he had worked the week. Hargrove blamed Patel and spoke to her the following day, on Saturday. Hargrove told Patel he did not get paid by SMG because SMG did not receive his work hours. Patel informed Hargrove to speak to Holmes. Hargrove spoke to Holmes on the same day, who told Hargrove he was aware of the problem but it was too late to submit his work hours and that Hargrove would receive his pay the following Monday. Hargrove testified he received his paycheck on the following Tuesday (Tr. 136–139). Herrera testified that Hargrove told her he was not paid on Friday. Herrera said that the problem was resolved the following Monday and that was the only occasion when Hargrove was not paid on time (Tr. 333).

On another occasion, Hargrove again blamed Patel when his hours were crossed out for 1 week on his timecard and the hours subsequently added back the following week. Hargrove said he blamed Patel because she was the only person he has been getting and giving back his timecards. Hargrove reported his timecard problem regarding Patel to another supervisor, Andrew (Carter), who told him to let the problem work itself out. Hargrove did not testify if there were any further problems with his timecards (Tr. 141).

Holmes testified that all temporary workers were required to print their name, sign, and log in the time they started work in a spiral notebook. In turn, Colart would submit the name of the workers and their time worked to the various staffing agencies for pay. Holmes stated that the hours were verified by Colart's HR department before they were sent to the staffing agencies. All Colart associates were paid on a weekly basis. Upon receipt of the workers' time worked, SMG and other staffing agencies would pay the salaries pursuant to their respective staffing contracts. Holmes stated that Colart stopped using the spiral notebook after some inaccuracies in the time recorded and the company decided to institute a time clock. He did not recall when the time clock was first used. Holmes recalled that Hargrove was not timely paid in October. He stated that all workers were paid on a Friday and Hargrove complained to him that he was not paid for that week, Holmes stated that he verified the logbook showing the hours that Hargrove wrote down. Holmes said he then contacted Laurie Herrera at SMG to confirm whether or not Hargrove was paid by SMG. Herrera informed Holmes that Hargrove's hours were missing. Hargrove sent the work hours to Herrera and a paycheck was sent to Hargrove on either Monday or Tuesday (Tr. 71–76; Jt. Exh. 2). Holmes testify that up to 70 employees would be using the logbook and entering their names and hours work. He said this was not the first occasion that workers' hours were not accurate.

Holmes verified Hargrove's work hours after receiving an email from Jaslin Cruz, at SMG regarding Hargrove's missing paycheck. Holmes then replied back to Cruz stating that Hargrove had actually worked that week. Holmes stated that the notebook was kept and managed by his human resource specialist. Holmes stated that leads are not involved in handling

the time and attendance notebook. Holmes stated that only temporary workers would sign the notebook and that permanent Colart employees use a timeclock system (Tr. 252–255).

Hargrove testified that he overheard a conversation in November involving Lisa Hush, Holmes, and a third coworker that Patel was no longer a lead and that she had not been a supervisor "for a long time." Hargrove did not ask Holmes about Patel's status but only overheard that conversation. Hargrove complained that although Patel was no longer a supervisor, she continued to order him to do things, like wrap the pallets, get boxes, realign, and move pallets (at least two or three times per day). He said that was not the responsibilities of a UPS processer and doing extra work affected the timeliness of getting out his orders. Hargrove recalled a couple of times in October that Henna gave him tasks to perform and Holmes subsequently countermanded the orders or modified the task to accommodate Hargrove's medical restrictions. Despite his concerns about the additional work given to him by Patel, Hargrove admitted that no one in management complained to him about his work speed or that he was not doing his job (Tr. 143–146).

Holmes testified that Patel is a lead and is responsible to distributing the work assignments given to her by the supervisors (Tr. 238). Holmes stated that Hargrove complained to him that Patel was watching over him. Hargrove told Holmes he did not like Patel watching him. Holmes told Hargrove that one of Patel's responsibilities is to observe the processors. Holmes stated that Patel complained to him on only one occasion when Hargrove did not complete an assignment. Holmes told Hargrove that Patel was just doing her job. Holmes denied telling Hargrove "not to worry about it" (Tr. 75–77). Holmes was not asked and he did not testify as to whether Patel was no longer in a lead position.

Henna Patel (Patel) testified that she has been employed by Respondent Colart for over 13 years and has been and is a lead for over 1 year. Patel has never been a supervisor and she reported to Babeski. Patel remembered Hargrove as a temporary worker assigned as one of the UPS processors. Patel said that one of her responsibilities was to reassign work when the UPS processors had no work of their own to perform (Tr. 58; 227–228). Holmes confirmed that the leads, including Patel, would report back to a supervisor to obtain more assignments for their workers (Tr. 238, 239). Holmes explained that when a UPS processor had completed all the tasks assigned, that processor would be moved to another department to work instead of standing around waiting for the next UPS shipment (Tr. 239, 240).

With regard to Hargrove's missing paycheck, Patel testified that the workers used a spiral notebook to enter their names and time. Patel insisted that it was not her job to maintain or control the hours of the workers in the binder. Patel stated the time and attendance was a supervisor's responsibility. Patel testified that Hargrove never complained to her about missing a paycheck or that his hours were not recorded. Patel also denied crossing out any of Hargrove's recorded work hours. Patel again insisted it was not her job to maintain the time records (Tr. 229–233).

d. Hargrove's medical restrictions

Hargrove testified that his medical condition restricted him from lifting or pushing anything heavier than 40 pounds. The record shows that Hargrove was examined by his physician on September 6 and October 4. No medical assessment was made on either September 6 or October 4. Hargrove testified he gave the doctor's receipt for the appointment to Patel on September 7. Hargrove stated that he also gave his October 4 medical receipt to Patel. He did not give the two notes to anyone else at Colart.

On November 1, Hargrove's physician wrote on a note that Hargrove had a medical appointment on November 1 and that this absence (from work) should be excused and further stated that Hargrove "…should be excused from heavy lifting or pushing in excess of 40 lbs." (Tr. 147–151; GC Exh. 13). Hargrove testified that he did not have this medical restriction prior to November 1 (Tr. 184).

Hargrove testified that he gave the November 1 physician note to Patel on November 2. Hargrove stated that he would inform Colart either through Homes, Patel, and Supervisor Carter, that he will miss work for that day. Hargrove stated that he usually told all three on the day before that he would be absent. Hargrove admitted that he did not notify anyone from SMG that he was missing work on September 6, October 4, or November 1.

Patel recalled that Hargrove would tell her that he could not move heavy items but never provided her with a medical note stating his physical limitations (Tr. 229).

Hargrove subsequently was absent from work on November 27. He stated that Colart was informed of his medical appointment on November 27, usually by telling Patel, Carter, and Holmes. Hargrove noted that he would tell all three individuals so that Colart knew of his pending absences (Tr. 151–156).

Holmes testified that Hargrove did not log in any hours and did not call in with his absence when he failed to work mandatory time on November 29 (Black Friday) (Tr. 80). Hargrove insisted that he worked on November 29 (Tr. 170). Hargrove repined that he did not receive his overtime wages for working on November 29 (Tr.192).

e. Hargrove threatened to go to the Labor Board

As noted above, Carlos Trejo was newly appointed as the distribution center manager on about November 14. Soon after his appointment, Hargrove spoke in private with Trejo (Tr. 167). Hargrove raised with Trejo that there were problems at the center and "…a lot of racism and mistreatment" of employees. Trejo was also told by Hargrove that "the company won't look good if he reported the racism and ill treatment of the workers to the agencies." Trejo testified that he told Hargrove that he is new in the position and promised to look into it. Trejo understood Hargrove had meant temporary staffing agencies and not agencies responsible for enforcing wages, labor, and employment discrimination laws (Tr. 25–27; 167–169).

Trejo recalled that Hargrove mentioned the racist treatment he received from lead Patel and Supervisor Cardona (Tr. 286). Trejo testified that he also received complaints of racism and ill treatment from other employees during the first few weeks he started as the distribution center manager. Trejo did not recall the names of the employees who had complained to him (Tr. 28). Trejo also knew from Holmes that Hargrove was not happy when his chair was removed (GC Exh. 19). Trejo denied any conversations with Hargrove about chairs being removed (Tr. 285).

Hargrove testified he worked on Saturday, November 30 (Tr. 80–82). Holmes also worked on November 30. Holmes testified that Hargrove approached him during the morning of November 30 and complained about the chairs being removed. This was not the first time that Hargrove had complained about the workstation chairs being removed by management and Holmes reiterated the reason he gave Hargrove during the summer that the chairs were removed while the workstations were being delivered from the old to the new distribution center.

According to Holmes, Hargrove stated that he could get a medical note that required him to sit while working. Holmes advised Hargrove to do so because Colart was unaware of his medical limitations (Tr. 257, 258).

At this point of their conversation, Holmes testified that Hargrove mentioned going to the Labor Board. Holmes testified that Hargrove complained about the chairs being removed and threatened to go to the Labor Board because Colart was not allowing him to sit down. In response, Holmes stated that (Tr. 258, 259):

> Yes, I advised him to go to the Labor Board. We can't stop him, but I was totally unaware of him having restrictions to be allowed to sit and if he any doctor's notes to go get them.
>
> He mentioned that he had one in his car. I advised him to go get it to give it—to provide it to me, which he did not.

Holmes denied threatening Hargrove because he complained about working conditions or for talking to other employees. Holmes told Hargrove to go to the Labor Board since there was nothing he can do to prevent Hargrove from going (Tr. 259).

According to Hargrove, he did not mention to Holmes about going to the Labor Board until after his noontime conversation with Andrew Carter. Hargrove testified that he spoke to Supervisor Carter about noon time on November 30. Hargrove testified that Carter allegedly told him that he overheard a conversation with Patel talking bad about Hargrove to Supervisor Sanjay (Marwaha)[8] and that it was Patel's goal to get Hargrove fired. Hargrove did not testify as to what Carter had actually overheard, only that she was talking "bad" about him. Carter allegedly told Hargrove to do "extra good" around Patel (Tr. 170, 171). Carter did not testify at the hearing.[9]

[8] Sanjay is Sanjay Marwaha and was the interim director of operations overseeing all operations for the distribution center at the time (R. Colart Br. at 3).

[9] Respondent Colart was provided an opportunity to call Carter as a witness but subsequently declined to do so (Tr. 346, 347).

Hargrove testified he became concern and decided to seek out Holmes shortly after his noon conversation with Carter (Tr. 195, 196). Hargrove informed Holmes of his conversation with Supervisor Carter and told Holmes something needs to be done about Patel. Hargrove did not mention Carter's name but said that "somebody just came and told me that she's trying to get me fired, talking bad about me to Sanjay and if she don't stop, I'm going to the (National) Labor Board" (Tr. 171). At this point, Hargrove reminded Holmes of all the issues regarding his work related problems (Tr. 171, 172):

> And he said you're going to the Labor Board for and I just reminded him of all the issues as far as me not getting paid on time, you just took our chairs recently without no good -- without no good explanation, you're reassigning me and Lisa now and when people bring up issues and stuff like that, it's when these reassignments happen because of the people that's involved in the issues. It seems like to me like everybody that had issues were going through something.
>
> I told him that if I went to the Labor Board that somebody was going to have to -- I also said something in particular about Brian being hired as a supervisor straight up ahead of Lisa, Sal and Yusef, and that if anybody went to the Labor Board about it, it would be a problem.[10]

f. The discharge of Hargrove on about December 2 and the threat of unspecified reprisal

According to Holmes' testimony, Supervisor Lesbia Cardona approached him after his conversation with Hargrove on the morning of November 30. Holmes testified that Supervisor Cardona complained about Hargrove's work performance. Cardona told him that Hargrove was not working in a timely manner during the Black Friday weekend and on one of the busiest shopping day of the year (Tr. 87, 257). After speaking with Cardona, Holmes observed Hargrove at the workstation talking to Lisa Hush (Tr. 89, 90). After observing the two for a few minutes, Holmes approached Hargrove and spoke to him a second time about returning back to work. According to Holmes, Hargrove said he is doing nothing wrong and that he has been working.

According to Hargrove, Holmes replied by saying that if anyone still has a chair, it is for a medical accommodation. Hargrove stated he has no medical restrictions in standing and that his only medical issue is not to push or pull more than 40 pounds. Hargrove commented to Holmes that he did not have a medical condition requiring a chair as an accommodation but did state that the chairs were removed because of race and that he, Lisa (Hush), Sal and Yusef were African-Americans (Tr. 172, 173).[11]

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[10] The reference was to Brian (Babeski) (Caucasian) being promoted over the Black UPS processors.

[11] Yusef is Yusef Richardson and a lead. Sal is Saladine Russell who was also a lead at the time (Tr. 59; R. Colart Br. at 3).

During their conversation, Holmes testified that Hargrove was upset about the chairs being removed from the workstations. Holmes recalled having a similar conversation with Hargrove over the chairs being removed in late summer. According to Holmes, Hargrove did not ask why the chairs were removed; only to complain to him that he was upset. Again, Hargrove blamed Patel and Cardona for initiating the removal of the chairs due to their racial bias against African-American workers (Tr. 83, 274). Hargrove testified that he had spoken to other processors about the chairs being removed, to include Lisa, Dempsey (James), and Yusef (Tr. 163).[12]

Hargrove testified that Lisa Hush was present during this conversation and interjected that she believed that Holmes was the one responsible for removing the chairs and that Cardona and Patel had no authority to remove chairs (Tr. 83, 84). Holmes testified that Hargrove stated that Colart was violating labor laws because he was not allowed the use of a chair to sit while working due to his medical limitations. Holmes asked that Hargrove provide a doctor's note and Hargrove replied that he has a note in his car. Holmes said he never received a medical note from Hargrove (Tr. 84).

Holmes testified that the chairs were removed from the processors' workstations in late October and before November. A platform was placed on top of the desk for added height to accommodate the computer. Holmes explained that once the computer was place on top of the desks, now raised higher by the platform, there was no longer any reason to sit down since the computer would now be eye level to the processor while s/he was standing. Holmes indicated that the workstations were used in the old distribution center and that the chairs were only temporary until the workstations were eventually moved to the new distribution center in the fall (Tr. 77–80). He stated that the UPS processors worked with regular height desks and Colart ended up providing chairs to the processors so that they were eye level to the computers and they would not have to bend over. Holmes stated that eventually the chairs were removed once the workstations were delivered from the old distribution center (Tr. 245–248; RColart Exh. 3 (picture of workstation)). Hargrove testified that Holmes never told him that the chairs were temporary until the standup workstations arrived from the old distribution center (Tr. 188).

Holmes recall his conversation with Hargrove over the removal of the chairs in late summer, perhaps in September or October 2019 (Tr. 272). Holmes testified that he explained to Hargrove that the chairs were temporary until the workstations were delivered to the new distribution center. Holmes stated that none of the other workers complained to him about the chairs being removed (Tr. 250, 251).

Shortly thereafter, also on November 30, Holmes spoke to Trejo regarding Hargrove's job performance and being upset with the removal of the chairs. Holmes believed it was either the late morning or early afternoon that he met with Trejo. Holmes told Trejo that Hargrove did not work efficiently and Trejo responded to observe Hargrove and "…see how the rest of the day goes… (Tr. 87, 258–260).

[12] All three are African-Americans employed as UPS processors by Colart.

After speaking with Trejo, Holmes testified that they then met with Sanjay Marwaha later in the day and were actually observing Hargrove while working. Holmes stated that they observed Hargrove standing by his workstation and not doing any assigned tasks. Holmes then recommended to Marwaha and Trejo to dismiss Hargrove for the rest of the day.

Holmes testified that Marwaha made the determination to reassign Holmes on Monday, December 2 (Tr. 93). Holmes stated that either Trejo or Marwaha responded it was not a good suggestion to dismiss Hargrove on Saturday due to the workload during the Black Friday weekend and agreed to discuss his performance on the following Monday (Tr. 258–261).

According to Trejo, his conversation with Holmes and Marwaha included operational matters and not just about Hargrove' job performance. Trejo said that the meeting turned to Hargrove when they saw him not working. Trejo recalled that Hargrove did not want to move a pallet as instructed by Cardona until he saw Trejo approaching and then started moving the pallet. Trejo testified that he spoke to Holmes about Hargrove's performance over the pallet incident (Tr. 31, 32; 294–296). Trejo said that Marwaha did not contribute to the discussion about Hargrove. Trejo testified that Holmes then stated that he was also aware of Hargrove not finishing tasks given to him by supervisors and leads. Trejo said that Holmes did not mention any particular incident with Hargrove but did mention his refusal to accept or finish work given by Cardona and Patel. Trejo said the decision to dismiss Hargrove was jointly made during this conversation, but they decided to release him on the following Monday because he was needed to continue working the Black Friday weekend (Tr. 33–35).

On the following Monday, December 2, the workers had their usual morning meeting regarding work assignments, number of orders, and general operations. Hargrove was present at the December 2 morning meeting. Hargrove testified that Holmes and Trejo spoke to the group of associates. Hargrove said that Holmes spoke first and congratulated the workers on meeting their goal (Tr. 174). Holmes testified that he did not recall speaking at the December 2 meeting (Tr. 94).

Hargrove testified that Trejo next spoke to the group about comments he heard regarding racism and ill treatment of the workers and that he will take care of the problems. According to Hargrove, Trejo told the group not to talk about the problems among themselves and Trejo wanted everyone to voice their concerns only with him (Tr. 173–175).

Trejo spoke to the group about following the chain of command and to speak to him or others in management if there were any questions about work assignments (Tr. 94, 95). Holmes testified no one spoke to comment or ask any questions at that meeting. Trejo explained to the group that giving assignments and relocating the associates is not racism and that they should just perform their jobs. Trejo also insisted that the associates could talk among themselves, but they should also bring up their issues with management because he wanted an open dialogue (Tr. 35–37; 297, 298; GC Exh. 19).

After the meeting, Holmes and Trejo met with Hargrove. Hargrove testified that Holmes told him that today (December 2) was his last day at Colart. Hargrove asked for an explanation and Holmes told him that the SMG will provide him with the details (Tr. 175, 176). According

to Holmes, he had in fact told Hargrove the reasons were for his inability to listen to the leads and to follow instructions. Holmes stated that Hargrove was being disruptive and that Colart was ending his assignment with the company. Hargrove acknowledged that he was let go and left the facility. Holmes testified that (Tr. 96):

> We said it was based off of his job performance and him not working on the required mandatory Black Friday workweek, I mean the mandatory Black Friday, the mandatory day after Thanksgiving.

Holmes testified that Hargrove was reassigned in December 2019, due to his job performance. Holmes stated that Hargrove had issues following instructions from leads and supervisors in regard to completing his daily tasks. Holmes specifically mentioned Patel as the lead who had informed him that Hargrove was not completing his work assigned to him with respect to assignments not involving his UPS activities. Holmes insisted that he had previously spoken to Hargrove about not completing non-UPS assignments and Hargrove would complain that Patel was watching over. Holmes repeated that it was the lead's responsibilities to watch over the workers that were assigned to the different tasks (Tr. 255, 256).

g. Hargrove's interaction with Respondent SMG after his termination

Holmes stated that he sent an email to Laurie Herrera (Herrera) at SMG informing the reasons for Hargrove's reassignment back to SMG (Tr. 261–264; Jt. Exh. 3). The email reflects problems with Hargrove's job performance and Holmes mentioned to Herrera in the email that Hargrove had threatened to report Colart to the Labor Board. The email stated, in part, that:

> FYI we are ending John Hargrove's assignment due to his in ability to follow instructions form Supervisors/Leads (sic).
>
> On numerous occasions I have spoken to John that he must complete task given to him by Leads/Supervisors.
>
> John stated we are violating labor laws by requiring him to stand for 8 hours without sitting. Last month we removed chairs from the DC which were being used for UPS processing, we installed workstation to raise the desktops and purchased fatigued mats for all UPS workers only. John stated he has Dr notes stating he cannot stand for 8 consecutive hours, due to a car accident. I advise him Colart does not have any documentation claiming this, and I also advised him if he cannot stand for 8 hours due to medical reasons, he must go home due to Colart does not have light duty. John has not provided any documentation to Colart that he is required to sit.

Hargrove said that he called Herrera at SMG after leaving the facility (Tr. 202). Herrera was not available but did call Hargrove later that morning. According to Hargrove, Herrera told him that she had not yet been informed that Colart had dismissed Hargrove. Herrera subsequently texted Hargrove and informed him by text that Colart "reassigned" him because he wasn't following directions from his supervisors (Tr. 202, 203). According to Hargrove, Herrera called Hargrove the following day and told him that Colart had terminated him because Hargrove

was unable to stand while working. Hargrove told Herrera that his only medical limitation was not to push or pull more than 40 pounds.[13]

Hargrove said that about December 5, Herrera called him about another job and will contact him when she finds more information from the new company. Hargrove sent Herrera a text with a copy of the medical note on December 11 indicating his medical limitations for the new job (Tr. 203). Hargrove repined that he had not heard back from Herrera and after a few days, he received a call from Herrera informing him there was no work available (Tr. 175–179). Hargrove denied Herrera told him that the new job was no longer available because he was late in submitting his medical note (Tr. 203, 204).

Herrera testified that she has been employed by Respondent SMG as the recruitment manager for the past 9 years. As a recruitment manager, Herrera is responsible for overseeing the daily operations of SMG in recruiting, hiring and matching candidate for potential jobs. Herrera recalled Colart as one of the client companies that has used the hiring services of SMG (Tr. 332, 333).

Herrera knows Hargrove as one of SMG's employees assigned to work at Colart. Herrera recalled that Hargrove had contacted her in October to complain that he was not paid. Herrera said that the problem was quickly resolved. Herrera does not recall any other complaints from Hargrove except for the one time with his missing paycheck (Tr. 333, 324).

Herrera stated that she was aware on December 2 that Colart wanted to terminate Hargrove's assignment when she received an email from Holmes (Jt. Exh. 3). Herrera replied to Holmes by email on December 3 that she would document the information from his email to Hargrove's files and asked Holmes for any documentation (Tr. 324; SMG Exh. 3).

Herrera testified that she spoke to Hargrove on December 2 that his assignment with Colart ended due to his inability to follow instructions and that SMG can assist him with employment elsewhere. Herrera said Hargrove was unhappy with his dismissal and told Herrera that he was terminated because he complained to Colart that his chair was removed (Tr. 340, 341; SMG Exh. 1).

DISCUSSION AND ANALYSIS

The counsel for the General Counsel contends that Respondents violated section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they discussed their concerns about racism, ill treatment, and work assignments among themselves. The counsel for the General Counsel also contends that the Respondents violated section 8(a)(1) of the Act by discharging Hargrove because of his protected concerted activity and violated 8(a)(4) and (1) for threatening to report the Respondents to the Labor Board (GC Br.).

[13] Sandak testified that it is the associate's responsibility to contact SMG if there were any new medical restrictions in performing on the job with a client company. Sandak said that the employee would provide SMG with any medical documentation and SMG would conduct an assessment with the client to determine whether an accommodation is possible to allow the associate to continue working at the job site (Tr. 326–329).

The Respondents contend that Colart and SMG are not joint employers and deny that Hargrove was discharged. Respondent Colart argues that Hargrove was reassigned back to SMG after not being a "good fit" with the company (R. Colart Br.). SMG argues that Hargrove was not discharged because there were no jobs to refer Hargrove after he was reassigned by Colart (R. SMG Br.).

In assessing credibility, I have considered factors such as: the context of the witness's testimony, the quality of the witness's recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all or nothing propositions.

A. Respondents Colart and Staff Management are Joint Employers and Jointly Liable

The first issue to be resolved is whether Respondent Colart and Respondent Staff Management Group were joint employers of the temporary employees assigned to Colart's distribution center. Respondent SGM supplied the temporary workers, including John Hargrove, to Respondent Colart. The Respondent Colart argues that it ended Hargrove's assignment by reassigning him back to SMG because Hargrove was not a good fit with the company. Respondent Colart argues it took no action to terminate Hargrove but merely returned him to SMG. Respondent SMG argues that it did not control or supervise Hargrove while he was working at Colart and did not dictate his assignments, work schedule, or any aspects of his work.

In *TLI, Inc.*, 271 NLRB 798 (1984), the Board adopted the Third Circuit's test in *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117 (3d Cir. 1982), for determining whether two separate corporations should be considered to be joint employers with respect to a specific group of employees. The test is. . . Where two (or more) separate entities share or codetermine those matters governing the essential terms and conditions of employment, they are to be considered joint employers for the purposes of the Act. The Board stated, "the joint employer concept does not require the existence of a single integrated business enterprise." The concept recognizes that "the business entities involved are, in fact, separate but that they share or co-determine those matters governing the essential terms and conditions of employment." Id. (quoting *NLRB v. Browning-Ferris Indus.*, 691 F.2d 1117, 1123 (3d Cir. 1982)).

In *Laerco Transportation*, 269 NLRB 324 (1984), the Board, referring to the *Browning-Ferris* test, defined the essential terms and conditions of employment as those involving such matters as hiring, firing, disciplining, supervision, and direction of employees. The Board stated that a joint-employer relationship exists where two or more business entities are in fact separate but they share or codetermine those matters governing the essential terms and conditions of employment. Moreover, "whether an employer possesses sufficient indicia of control over petitioned-for employees employed by another employer is essentially a factual issue." Id. "To establish joint employer status there must be a showing that the employer meaningfully affects

matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction." Id.

In *BFI Newby Island Recyclery*, 362 NLRB 1599 (2015), the Board restated the joint-employer standard as reflected in the *TLI* and *Laerco* decisions and reaffirmed that standard articulated in the Third Circuit *Browning-Ferris* decision,[14] that is ". . . we will adhere to the Board's inclusive approach in defining the "essential terms and conditions of employment."' In *BFI*, the Board adopted a two-part test to determine if there was abjoint employer relationship. The Board described the following joint employer test:

> The Board may find that two entities . . . are joint employers of a single work force if they are both employers within the meaning of the common law, and if they share or codetermine those matters governing the essential terms and conditions of employment. [citations and footnotes omitted].

Applying this test as to whether the entities are in fact separate but share or co-determinate matters governing the essential terms and conditions of employment, the Board stated that it would focus on whether an alleged joint employer "meaning fully affects matters relating to the employment relationship, such as hiring, firing, discipline, supervision, and direction." *Laerco*, above at 325.

Hence, the Board no longer requires that a joint employer possess and exercise the authority to control employees' terms and conditions. Rather, the Board held that "control" can now be direct, indirect, or even a reserved right to control, whether or not that right is ever exercised. Additionally, in defining essential terms and conditions of employment, the Board held it includes not only hiring, firing, discipline, supervision, direction, and determining wages and hours, but it also includes dictating the number of workers to be supplied, controlling scheduling, seniority, overtime, and assigning work and determining the manner and method of how work is to be performed. Id. The Board noted that the burden of proving joint-employer status rests with the party asserting that relationship. Id.

Based on the evidence, I find that the General Counsel has presented sufficient evidence to establish that Respondent Colart and Respondent SMG were joint employers over the temporary employees referred to work at the distribution center. As previously stated, when Respondent Colart requires temporary employees, Colart negotiates a service contract with one of the staffing agencies, including with Respondent SMG. The service agreement identifies the number of employees needed, where they will be needed, what shift they will be working, the rate of pay of the employees and how long the assignment will last. Respondent Colart can identify, as it did with Hargrove, the name of the person it wants SMG to send to Colart as a temporary employee. Once assigned, Respondent Colart can convert a temporary employee to a permanent employee after the assignment is over. Sandak testified that Colart has no authority to determine any disciplinary actions against SMG employees (Tr. 325). However, I find that the reassignment of Hargrove by Respondent Colart back to SMG was tantamount to a disciplinary discharge of a SMG employee. There is no dispute that Respondent Colart

[14] *NLRB v. Browning-Ferris Industries of Pennsylvania, Inc.*, 691 F.2d 1117 (3d Cir. 1982), enfd. 259 NLRB 148 (1981).

contacted Laurie Herrera at SMG to terminate the assignment of Hargrove following the December 2 meeting.

Respondent SMG has no supervisors or managers working at Respondent Colart's distribution center despite the temporary employees were recruited and hired by SMG. The only onsite supervisors or lead people are those who work for Respondent Colart. Work assignments at the distribution center were given by Colart's supervisors and leads to the temporary employees. Consequently, under this employment scenario, Colart had full authority over the supervision, assignment of work, and the scheduling of work of SMG employees.

Finally, Respondent Colart is responsible for the temporary employees being paid. As previously stated, the temporary employees assigned to the distribution center record their time using a spiral notebook. Respondent Colart gathers and remits the time and attendance information to SMG for processing. SMG calculates the hours worked and then sends the totals back to Respondent Colart to verify that the employees worked the hours listed. Once verified by Colart, SMG then completes the payroll process, including issuance of the paychecks. SMG had no independent knowledge as to the accuracy of the hours worked by its associates at Colart.

In *Orchids Paper Products Company,* 367 NLRB No. 33 (2018), the Board found that the Respondent, a paper company, is a joint employer of the temporary employees supplied by a staffing agency. The staffing agency "People Source" supplies temporary employees to Orchids. The Board determined if Orchid and "People Source" were joint employers by looking at how much control they had over the temporary employees. Here, similar to the situation in *Orchids*, Respondent Colart gathers and remits the time worked by the temporary employees from the spiral notebook and relays the information to SMG for processing. Respondent SMG was also in charge of paying the temporary employees. As in *Orchids,* once verified, SMG then completes the payroll process, including issuance of the paychecks. In regard to Respondent Colart's control, it had full control over firing the employees. Respondent Colart argues that it did not discharge Hargrove. I find this is fiction. Holmes and Trejo told Hargrove he was no longer working at Colart. Although they used the word "reassigned," it was clear that Hargrove was in fact dismissed by Colart. The record shows that if a temporary employee is not a good fit with the company, Respondent Colart is free to dismiss that employee. Employer Colart also laid out the terms of assignments to the temporary workers and informs SMG through their service agreement the duration of time the temporary workers are assigned to Colart. Colart could decide at any time, depending on operational needs, to increase the number of temporary employees recruited and hired by SMG or to end their employment.

In *Aim Royal Insulation, Inc*., 358 NLRB No. 91, slip op. at 7–8 (2012), the Board stated:

> Second, we find that Aim and Jacobson acted as joint employers with regard to McMillan, Bolaños, and Gonzalez. The test for joint-employer status is whether two entities "share or codetermine those matters governing the essential terms and conditions of employment." *Laerco Transportation,* 269 NLRB 324, 325 (1984). To establish a joint-employer relationship, there must be evidence that one employer "meaningfully affects matters relating to the employment relationship such as hiring, firing, discipline, supervision, and direction of the other employer's employees." Id.

The Board also articulated in *Aim Royal Insulation*, above, that in a joint employer situation dealing with an unlawful firing that the Board will find both joint employers liable for an unlawful employee termination only when the record permits an inference (1) that the nonacting joint employer knew or should have known that the other employer acted against the employee for unlawful reasons and (2) that the former has acquiesced in the unlawful action by failing to protest it or to exercise any contractual right it might possess to resist it. The Board stated the employers in *Aim Royal Insulation* were jointly liable for the unlawful refusal to hire certain applicants, stating that:

> Finally, we find that Jacobson is jointly liable for Aim's unlawful conduct. Under *Capitol EMI*, supra, once the General Counsel has established that the two employers were joint employers and that one of them has taken an unlawful discriminatory action against an employee in the jointly managed work force, the burden shifts to the employer seeking to escape liability to show that it neither knew nor should have known of the reason for the other employer's action. Id. at 1000. In the present case, because the Acting General Counsel has met his burden, the burden shifted to Jacobson. The record, however, makes clear that Jacobson Account Manager Chavez was fully aware that Aim Superintendent Campos' requests were motivated by union considerations: Chavez probed the applicants regarding their union status, passed this information to Campos, and then wrote "Union" on their applications. See *Skill Staff of Colorado*, 331 NLRB 815 (2000)

Here, I agree with the counsel for the General Counsel (GC Br. at 66, 67), that Respondent SMG was made aware of the ill treatment of Hargrove regarding the removal of the chairs that it was obligated to investigate whether Respondent Colart acted against Hargrove for unlawful reasons but did nothing. Holmes' email to Herrera stated that Hargrove complained Colart was violating labor laws (Jt. Exh. 3). This comment should have triggered an inquiry by SMG to investigate the complaint by one of its employees against Colart. By not inquiring as to the reasons for the discharge, SMG acquiesced to the unlawful action by failing to investigate, protest, or exercise any contractual right it might possess to ascertain the accuracy of the reasons for removing one of its employees.

Based on the foregoing, I find that Respondent Colart and Respondent SMG are joint employers because they directly codetermine the essential terms and conditions of employment for these temporary employees.

B. Alleged Threat of Unspecified Reprisals by Trejo

Section 7 of the Act provides that, "employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . [Emphasis added]." Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Carlos Trejo is and was the distribution center manager at the time. He was appointed to his position on about November 14. Trejo was responsible for the overall distribution and operations at the center. At the start of his new position, Trejo canvassed the workers on the floor. He testified speaking to Hargrove and other workers. He could not recall the names of the other employees. Trejo did recall that, like Hargrove, the others spoke to him about racism, ill treatment by supervisors and leads, preferential treatment, and work assignments (Tr. 310–312; GC Exh. 19). Trejo testified that Hargrove said that there were agencies he could go to and report these problems (Tr. 25–28). Here, Trejo indicated that he believed Hargrove was referencing the staffing employment agencies. Given the circumstances that Hargrove was speaking to Trejo about racism and maltreatment of workers, I find it more credible than not that Trejo understood that Hargrove was referring to state and federal agencies responsible for the labor and discrimination laws and not the staffing agencies. This finding would be consistent with testimony by Holmes that he had in fact conversed with Trejo about Hargrove's complaints that the chairs were removed due to racism and that Hargrove commented about going to the Labor Board with his complaints. Trejo also felt the allegations by Hargrove and the associates serious enough to address at a group meeting.

On December 2, the employees had their usual morning meeting. Trejo and Holmes were present. Holmes testified that the supervisors spoke first. Holmes testified that he could not recall speaking to the group (Tr. 94, 262). Holmes recalled there were discussions on work assignments, number of orders, and general operations. Hargrove was present at the December 2 morning meeting. Hargrove testified that Holmes and Trejo spoke to the group of associates. Hargrove said that Holmes spoke first and congratulated the workers on meeting their goal. Holmes testified that Trejo spoke afterwards to the group. Holmes' testimony stated that (Tr. 262, 263):

> I think he (Trejo) was talking about the perception in regards to tasks being distributed in the DC and if anybody had any issues to follow the chain-of-command and to come talk to, you know, himself or anybody else in upper management.

Trejo spoke next about hearing comments about racism and ill treatment of the workers and that he will take care of the problems. According to Hargrove, Trejo told the group not to talk about the problems among themselves and wanted everyone to voice their concerns only with him (Tr. 173–175). Hargrove's testimony was actually corroborated by Trejo's own testimony. Trejo told the group to follow the chain-of-command and to speak to him or others in management if there were any questions about work assignments (Tr. 94, 95). Holmes testified no one spoke to comment or ask any questions at that meeting. Trejo explained to the group that giving assignments and relocating the associates is not considered racism and that they should just perform their jobs. Trejo also insisted that the associates could talk among themselves but should also bring up their issues with management because he wanted an open dialogue (Tr. 35–37; 297, 298; GC Exh. 19).

The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara News-Press*, 357 NLRB 452, 476 (2011); *Multi-Ad Services*, 331 NLRB 1226, 1227–1228 (2000); *Westwood Health Care Center*, 330 NLRB 935,

949 (2000). In deciding whether an employer has made a threat in violation of this prohibition, the Board considers the totality of the circumstances in assessing whether a statement or conduct has a reasonable tendency to interfere, restrain, or coerce employees. *KSM Industries*, 336 NLRB 133 (2001); *Mediplex of Danbury*, 314 NLRB 470, 471 (1994). The test for it is an objective one. *G4S Secure Solutions (USA) Inc.*, 364 NLRB 1327, 1328–1329 (2016). "[T]test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not turn on the employer's motive or on whether the coercion succeeded or failed." *American Tissue Corp*., 336 NLRB 435, 441 (2001), citing *NLRB v. Illinois Tool Works*, 153 F.2d 811, 814 (7th Cir. 1946).

I find that Trejo's statements made during the December 2 group meeting was an unspecified threat of reprisal in violation of section (a)(1) of the Act. First, the employees' activities in complaining to Trejo in private and as a group about workplace terms and conditions of employment, such as task assignments, relocation of assignments, treatment by leads and supervisors, and racism are clearly protected activities under Section 7 of the Act. Second, Trejo's statement that the employees should follow the chain-of-command in complaining about workplace terms and conditions is a violation of the Act even though he may have qualified the comment with the statement that workers can talk among themselves. The comment to "follow the chain-of-command" nevertheless, has a chilling effect on the workers. A reasonable person would tend to refrain from complaining and discussing about workplace problems after hearing Trejo tell them that work assignments and relocating the associates is not racism and that the workers should just do their jobs. The chilling effect was not eliminated by Trejo's general disclaimer that the employees can talk to each other. Third, Trejo's pronouncement to the employees that there would be a problem if they spoke to each other about workplace conditions and racism is a direct threat of unspecified reprisal in violation of Section 8(a)(1) of the Act.

Accordingly, I find that the Respondents violated Section 8(a)(1) of the Act by threatening employees with unspecified reprisals if they discussed concerns about terms and conditions of employment among themselves.

C. Hargrove was Unlawfully Discharged

1. The Section 8(a)(1) violation

The counsel for the General Counsel argues that the Respondents discharged John Hargrove from his position at Colart because he concertedly complained to Colart regarding wages, hours, and working conditions of Colart's employees in violation of Section 8(a)(1) of the Act.

As a threshold matter, I find that Hargrove engaged concerted activities when he complained to Trejo and Holmes about the removal of the chairs, the work assignments given by the supervisors and leads, and racism in the workplace. In *Meyers Industries (Meyers 1)*, 268 NLRB 493 (1984), and in *Meyers Industries (Meyers 11*), 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." The activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity. Individual action is concerted so long as it is engaged in with the object of initiating or inducing group action. *Whittaker Corp*., 289 NLRB

933 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). The object of inducing group action need not be express.

In *Mushroom Transportation Co*., above, the court held that "a conversation may constitute a concerted activity although it involves only a speaker and a listener, but to qualify as such, it must appear at the very least it was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of employees." The court added that "[a]ctivity which consists of mere talk must, in order to be protected, be talk looking toward group action. . . . [I]f it looks forward to no action at all, it is more than likely to be mere 'griping.'" The standard set forth in *Meyers* remains the applicable test for determining when activity that "in its inception involves only a speaker and a listener" constitutes concerted activity. 281 NLRB at 887 (quoting *Root-Carlin, Inc.,* 92 NLRB 1313, 1314 (1951)). Under that standard, "'it must appear at the very least'" that such activity "'was engaged in with the object of initiating or inducing or preparing for group action or that it had some relation to group action in the interest of the employees.'" Id. (quoting *Mushroom Transportation*, 330 F.2d at 685 (emphasis added)).

Here, Hargrove's complaints to Holmes about the removal of the chairs from the associates' workstations in November were clearly for the purpose of initiating or inducing group action. Hargrove testified that he asked Holmes for the reasons that the chairs were removed from the UPS processors' workstations. Hargrove believed the chairs were removed due to racism against the African-American workers. Hargrove and his co-workers, Hush, Russell, Richardson and James, discussed the removal of the chairs among themselves (Tr. 162–164). Hargrove and Hush worked near each other and they had numerous conversations regarding the removal of the chairs. Holmes testified that the chairs were placed on a temporary basis until the workstations arrived from the old distribution center. However, in subsequent testimony, Holmes also testified that platforms were placed on top of the regular desks to raise the height of the desks so that the processors did not need to bend over while using their computers. Holmes stated that cushion floor mats were also placed by the desks so that the workers did not tire while standing for the entire work shift. In my opinion, this made little sense since the chairs could have remained in place, which would allow the workers to be comfortable while working and being eye-level with the computers, instead of removing the chairs and then having to place platforms on the desks to achieve the same purpose.[15]

Additionally, Hargrove initiated activities concertedly with others regarding racism in the workplace. Hargrove approached Trejo just after Trejo was appointed as the new distribution center manager in late November (Tr. 167). Hargrove raised with Trejo that there were problems at the center and "…a lot of racism and mistreatment" of employees. Trejo was also told by Hargrove that the company won't look good if he reported the racism and ill treatment of the workers to the agencies. Although Hargrove approached Trejo with his individual complaints of racism from lead associate Patel and other supervisors, it is clear that Hargrove was initiating group action since others had also complained of similar maltreatment to Trejo. Trejo recalled that Hargrove mentioned the racist treatment he received from lead Patel and Supervisor

[15] No finding is made here as to whether the chairs were removed due to racism. I only raised this to point to the lack of credibility of Holmes' testimony for removing the chairs.

Cardona (Tr. 286). Trejo testified that he also received complaints of racism and ill treatment from other employees during the first few weeks he started as the distribution center manager.

Hargrove's conversations with Holmes and Trejo had the purpose of mutual aid or protection under *Fresh & Easy Neighborhood Market*, 361 NLRB 151 (2014), where a Board majority expansively interpreted Section 7's "mutual aid or protection" clause. In *Fresh & Easy*, a single employee was found to have a purpose of mutual aid or protection when she sought to have two coworkers sign a piece of paper (reproducing an obscene message scrawled on a whiteboard) relating to her individual complaint. In reliance on a "solidarity principle," the Board majority reasoned that a purpose of mutual aid or protection could be inferred because the employee was "soliciting assistance from coworkers." Id., at 156 (internal quotation omitted). Here, Hargrove was soliciting assistance and mutual support from coworkers in his complaints about the removal of the chairs, maltreatment by supervisors/leads, and racism in the workplace. I find that Hargrove raised these issues with Trejo and Holmes on behalf of himself and in concert with other associates at Colart.

Where the employer's motive for its action against an employee is alleged to be on account of the employee's union, concerted or protected activity, the appropriate analysis is provided by *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *Auto Nations, Inc.*, 360 NLRB 1298, 1301 (2014), enfd. 801 F.3d 767 (7th Cir 2015). Under *Wright Line*, the General Counsel has the burden of establishing that the employee's protected activity was a motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or other protected activity by the employee, employer knowledge of that activity, and antiunion animus on the part of the employer. *East End Bus Lines, Inc.*, 366 NLRB No. 180 (2018), slip op. at 1; see *Allstate Power Vac., Inc.*, 357 NLRB 344, 346 (2011), citing *Willamette Industries*, 341 NLRB 560, 562 (2004); see also *Austal USA, LLC*, 356 NLRB 363, 363 (2010).

Once the General Counsel makes that showing, the burden of persuasion "shift[s] to the employer to demonstrate that the same action would have been taken even in the absence of the protected conduct." *East End Bus Lines, Inc.*, above, slip op. at 1; *Allstate Power Vac.*, above at 346 (quoting *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004); see also *Austal USA*, above at 364. To establish this affirmative defense, "An employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Consolidated Bus Transit*, 350 NLRB 1064, 1066 (2007), quoting *W.F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. Mem. 99 F.3d 1139 (6th Cir. 1996).

I find that the counsel for the General Counsel met her burden to establish that Hargrove's protected activity was a motivating factor for his discharge. Where the General Counsel makes a strong showing of discriminatory motivation, the employer's defense burden is substantial. *East End Bus Lines, Inc.*, above, slip op. at 1; see also *Bally's Park Place, Inc.*, 355 NLRB 1319, 1321 (2010) (reversing judge and finding violation because judge "did not consider the strength of the General Counsel's case in finding that the Respondent met its *Wright Line* rebuttal burden"), enfd. 646 F.3d 929 (D.C. Cir. 2011); *NLRB v. CNN America, Inc.*, 865 F.3d 740, 759 (D.C. Cir. 2017).

Discriminatory motive of the adverse employment action taken may be established in several ways including through statements of animus directed to the employee or about the employee's protected activities, *Austal USA, LLC*, 356 NLRB 363, 363 (2010); the timing between discovery of the employee's protected activities and the discipline, *Traction Wholesale Center Co. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000); evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a nondiscriminatory explanation that defies logic or is clearly baseless, *Lucky Cab Co.*, 360 NLRB 271 (2014); *ManorCare Health Services – Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088 fn. 12, *citing Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556–557 (1994), enfd. Sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997)).

Animus can be inferred from the relatively close timing between an employee's protected concerted activity and his discipline. *Corn Brothers, Inc*., 262 NLRB 320, 325 (1982) (timing of discharge within a week of union organizing meeting evidence of antiunion animus); *Sears Roebuck & Co*., 337 NLRB 443, 451(2002) (timing of discharge, several weeks after employer learned of protected concerted activities, indicative of retaliatory motive).

I find that the timing of the concerted activity and Hargrove's discharged establishes a discriminatory animus. Here, Hargrove credibly testified that he spoke to Trejo and Holmes in late fall 2019 about the removal of the chairs, maltreatment from the leads and supervisors, and racist in the workplace and before his discharge on December 2. Hargrove's testimony as to when the conversations occurred is credible since Trejo did not start his new position until November 14 and Holmes testified that he recalled the conversation with Hargrove in late September or October (Tr. 272). Hargrove also complained to Holmes on November 30, who reported their conversation to Trejo and Marwaha. Holmes, Trejo and Marwaha made the joint decision to discharge Hargrove on November 30 but waited until after the group meeting on December 2 to inform Hargrove of his termination.

Indeed, similar to antiunion complaints, the "timing alone may suggest antiunion animus as a motivating factor in an employer's action." *Inova Health System v. NLRB*, 795 F.3d 68, 82 (D.C. Cir. 2015); *Advanced Masonry Associates, LLC*, 366 NLRB No. 57 (2018). As stated by the administrative law judge in *AdvoServ of New Jersey*, 363 NLRB 1324, 1354 (2016), Indeed, "timing alone may be sufficient to establish that union animus was a motivating factor in a discharge decision." *Sawyer of NAPA,* 300 NLRB 131, 150 (1990); *NLRB v. Rain-Ware,* 732 F.2d 1349, 1354 (7th Cir. 1084); *NLRB v. Windsor Industries,* 730 F.2d 860, 864 (2d Cir. 1984); *Manor Care Health Services—Easton,* 356 NLRB 202, 204, 226 (2010) (Proximity in time between discriminatee's union activity and discharge supports finding of unlawful motivation for the termination); *LaGloria Oil & Gas,* 337 NLRB 1120, 1123, 1132 (2002). ("Discharge shortly after Employer learned of employee's union activities, strongly supports a finding that discharge motivated by union animus").

I also find animus that the reasons for Hargrove's discharge were pretextual. The Respondent Colart argues that Hargrove was dismissed because of job performance. Holmes' email (Jt. Exh. 3) to Laurie Herrera stating that Hargrove was reassigned due to the numerous occasions he had to tell Hargrove to complete tasks assigned to him by leads and supervisors is inconsistent with the testimony of record. Hargrove testified that Patel complained once about his performance when Hargrove did not complete a task on time (Tr. 77). Trejo testified that he observed Hargrove refusing to push a pallet tasked by a supervisor but Hargrove did in fact move the pallet upon seeing Trejo approaching. Trejo did not testify observing any other similar incidents. Holmes testified that Hargrove failed to follow instructions, particularly with Supervisor Cardona and Patel. Cardona had only one complaint against Hargrove. Cardona did not testify. Patel testified that she complained once to Holmes about Hargrove not finishing an assigned task. Hargrove was not reprimanded or reported by Colart to SMG about his performance. Interestingly, while the decision to terminate Hargrove was made on November 30, Trejo kept Hargrove working for the rest of that day.

Respondent Colart proffered no documents of discipline, poor evaluations, or management notes to substantiate and corroborate the complaints against Hargrove. In addition, Holmes testified that a UPS processor should take around a minute to generate an address label and place the label on box (Tr. 244, 245). At the hearing, neither Respondents Colart or SMG produce any computer reports or data to show that Hargrove was untimely or inefficient in retrieving the boxes, generating address labels, placing the labels on the boxes, and then placing the boxes on the pallets.

In my opinion, the most damaging reason for Hargrove's dismissal was Holmes' testimony that Hargrove was reassigned because Hargrove did not work the mandatory day after Thanksgiving. Holmes testified that a factor for Hargrove's termination was that he did not work on November 29 (Black Friday) (Tr. 80, 96). This testimony is clearly false and Holmes never took the effort to review the time and attendance records of Hargrove to ascertain the accuracy of his assertion that he failed to work on Black Friday. In contrast, the record clearly shows that Hargrove had in fact worked Black Friday and the following Saturday. Admitted documents of record show that Hargrove worked 18 hours on Black Friday, November 29, and 12 hours on Saturday, November 30 (GC Exhs. 7, 18).[16] Additionally, the allegation that Hargrove did not work on Black Friday was not a reason given by Holmes in his email to Herrera to justify Hargrove's removal. Consequently, to the extent that Respondent Colart proffered this reason for Hargrove's reassignment, it is obviously false.

Accordingly, I find that the reasons for Hargrove's discharge was pretextual and false. As noted by the Board in *Golden State Foods, Corp*., 340 NLRB 382, 385 (2003), where, as here, there is a finding of pretext, "there is no need to perform the second part of the *Wright Line* analysis" to show that the Respondent would have taken the same action absent Hargrove's protected conduct.[17]

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[16] In her posthearing brief, counsel for the General Counsel indicated that the time records exhibit was GC Exh. 19 (see, GC Br. at 25). GC Exh. 19 is the sworn affidavit of Carlos Trejo.

[17] I also note that SMG never reassigned Hargrove to another position. Herrera testified that Hargrove failed to timely submit his medical restrictions and lost out on a job opening. Hargrove testified he texted his medical note to Herrera. Regardless whether Hargrove was untimely in

2. The Section 8(a)(4)and (1) violation

The counsel for the General Counsel also argues that the Respondents discharged John Hargrove from his position at Colart because he threatened to file a charge with the Board in violation of Section 8(a)(4) and (1) of the Act.

Section 7 of the Act protects the right of employees to unionize and engage in other concerted activities for mutual aid or protection, or to refrain therefrom, and to utilize the Board's processes by filing unfair labor practice charges free from coercion. See 29 U.S.C. §157; see also *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 740 (1983). Congress intended employees to be completely free to file charges with the Board, to participate in Board investigations, and to testify at Board hearings. *NLRB v. Scrivener*, 405 U.S. 117, 121–122 (1972). This is shown by Congress' adoption of Section 8(a)(4) of the Act, which makes it an unfair labor practice to discharge or otherwise discriminate against employees for filing charges or giving testimony under the Act. Under Section 8(a)(4) of the Act, it is unlawful for an employer to discipline or otherwise discriminate against an employee because he/she has filed charges with the Board, has testified in Board proceedings and/or has provided testimony in Board investigations. *NLRB v. Scrivener,* above. Discipline taken against an employee threatening to file a charge under the Act is equally a violation of Section 8(1)(4) and (1).

In cases in which motive is an issue, the Board analyzes 8(a)(4) and (1) violations under the *Wright Line,* above framework. Under this framework, it was the counsel's burden to establish discriminatory motivation by proving the existence of protected activity, the Respondent's knowledge of that activity, and the Respondent's animus against that activity. See *Donaldson Bros. Ready Mix, Inc*., 341 NLRB 958, 961 (2004), citing *Wright Line*, supra at 1089. Proof of animus and discriminatory motivation may be based on direct evidence or inferred from circumstantial evidence. *Robert Orr/Sysco Food Services*, 343 NLRB 1183, 1184 (2004); *Ronin Shipbuilding, Inc*., 330 NLRB 464, 464 (2000). If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the protected activity. *Allied Mechanical*, 349 NLRB 1327, 1328 (2007)

On two separate occasions, Hargrove informed management at Colart that he will go to the Labor Board because of workplace problems. Hargrove first spoke in private with Trejo in late November when Trejo was newly appointed as the distribution center manager (Tr. 167). Hargrove raised with Trejo that there were problems at the center and "…a lot of racism and mistreatment" of employees. Trejo was also told by Hargrove that the company won't look good if he reported the racism and ill treatment of the workers to the agencies. Trejo testified that he told Hargrove that he is new in the position and promised to look into it. Trejo did not deny that Hargrove made the comment to him about going to the agencies but understood Hargrove had meant temporary staffing agencies and not agencies responsible for enforcing labor and discrimination laws (Tr. 25–27; 167–169). I find as not credible that Trejo meant staffing

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submitting his medical note, no testimony was proffered from Herrera that SMG continue to match Hargrove qualifications with other job openings or that Hargrove was placed in another job. This effectively resulted in Hargrove's termination from SMG.

agencies and not governmental agencies. It is my belief that Trejo fully understood Hargrove's comment which was made in the context of the parties discussing mistreatment of employees and racism in the workplace. The clear implication of Hargrove's comment was that he was going to the Labor Board or another governmental agency and not to SMG.

The second occasion occurred on the morning of November 30. There was some confusion as to when Hargrove told Holmes he was going to the Labor Board. Accepting Holmes' testimony on this point, it seems that Hargrove complained to Holmes on the morning of November 30 about the chairs being removed. Holmes testified that Hargrove said he needed a chair because of a medical limitation. Hargrove denied he had a medical restriction requiring the use of a chair. Hargrove maintained that the chairs were removed due to racism against the Black UPS processors. It was during this conversation in the morning that Hargrove commented that he will go to the Labor Board. Hargrove testified (Tr. 171, 172):

> I told him that if I went to the Labor Board that somebody was going to have to -- I also said something in particular about Brian being hired as a supervisor straight up ahead of Lisa, Sal and Yusef, and that if anybody went to the Labor Board about it, it would be a problem.

In response, Holmes testified (Tr. 258, 259):

> Yes, I advised him to go to the Labor Board. We can't stop him, but I was totally unaware of him having restrictions to be allowed to sit and if he any doctor's notes to go get them.
>
> He mentioned that he had one in his car. I advised him to go get it to give it—to provide it to me, which he did not.

In my opinion, it is more likely than not that Holmes and Trejo compared notes after Hargrove told Holmes in the morning of November 30 about going to the Labor Board. Holmes denied talking to anyone in management about Hargrove's comments (Tr. 118), but the events following Holmes' knowledge that Hargrove was going to the Labor Board about his complaints were swift and immediate. After his conversation with Hargrove, Holmes spoke to Trejo regarding Hargrove's job performance and that he was still upset with the removal of the chairs. Holmes told Trejo that Hargrove was not working efficiently and Trejo responded that they should observe Hargrove and "…see how the rest of the day goes…" (Tr. 87, 258). Holmes testified that he and Trejo then met with Marwaha that afternoon and all three proceeded to observe Hargrove. Holmes stated that they observed Hargrove standing by his workstation and not doing any assigned tasks. Holmes recommended to Marwaha and Trejo to dismiss Hargrove for the rest of the day. Holmes testified that either Marwaha or Trejo said it wouldn't be a good ideal to dismiss Hargrove now (because of the Black Friday weekend) and to let him finish his shift (Tr. 258–260). Hargrove was discharged that following Monday, on December 2, after the associates group meeting in the morning.

Accordingly, I find that the General Counsel has satisfied its burden showing the Respondents violated Section 8(a)(4) and (1) when Hargrove was discharged for asserting his right to file a charge with the Labor Board.[18] Inasmuch as the Respondents' asserted reasons for Hargrove's discharge are false, as noted above, it is not necessary to address whether Hargrove would have been terminated absent his threats. *Golden State Foods Corp*., supra.; *Airgas USA, LLC*, 366 NLRB No. 104 (2018) at fn. 2.

CONCLUSIONS OF LAW

1. At all material times, the Respondents Colart of Americas, Inc. and Staff Management Group, LLC, are employers engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondents violated Section 8(a)(1) of the Act on about December 2, 2019, by discriminatorily terminating John Hargrove.

3. The Respondents violated Section 8(a)(4) and (1) of the Act on about December 2, 2019, by discriminatorily terminating John Hargrove.

4. The Respondents violated Section 8(a)(1) of the Act on about December 2, 2019, by threatening employees with unspecified reprisals.

5. The unfair labor practices described above affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondents have engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondents having discriminatorily discharged John Hargrove, I shall order the Respondents to make him whole for any loss of earnings suffered as a result of the Respondents' unlawful actions against him. I shall order the Respondents to offer John Hargrove full reinstatement to his former position or, if that position no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make him whole for any loss of earnings suffered as a result of the Respondents' unlawful actions against him. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), my recommended order requires Respondents to compensate John Hargrove for the

[18] I would find that Holmes, in denying he mentioned to Colart management about Hargrove going to the Labor Board, he nevertheless mentioned that information to Herrera at SMG in his December 2 email. Consequently, by doing nothing to inquire and investigate this allegation, SMG was equally responsible and violated Section (a)(4) and (1) of the Act.

adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB 1324 (2016). I would further recommend that the Respondents provide the Regional Director for Region 22, the affected employees' W-2 forms to address the possibility that the SSA may not accept Respondents' backpay reports without the accompanying W-2 forms to ensure that the allocation of backpay awards are accurately made to the appropriate calendar quarters. *Cascades Containerboard Packaging-Niagara*, 370 NLRB No. 76 (2021).

In addition to the remedies ordered, I shall recommend that the Respondents compensate John Hargrove for any search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. *King Soopers, Inc*., 364 NLRB 1153 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

It is further recommended that Respondents remove all references to the termination on about December 2, 2019, from the files of John Hargrove and to notify him in writing that it has done so and that the discharge will not be used against him in any way.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[19]

The Respondents, Colart of Americas, Inc and Staff Management Group, LLC, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, or otherwise discriminating against employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Make John Hargrove whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether he received interim earnings in excess of these expenses, suffered as a result of the unlawful discharge, as set forth in the remedy section of this decision.

[19] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(b) Compensate Hargrove for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 22 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of John Hargrove on about December 2, 2019, and thereafter notify him in writing that this has been done and that his discharge will not be used against him in any way.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(f) Within 14 days after service by the Region, post at the existing property of Colart of Americas, Inc at 2 Corporate Place, South, Piscataway, New Jersey and the existing property of Staff Management Group, LLC at 314 Campus Drive, Edison, New Jersey, a copy of the attached notice marked "Appendix."[20] Copies of the notice, on forms provided by the Regional Director for Region 22, after being signed by the Respondents' authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondents customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since December 2, 2019.

(g) Mail a copy of said notice to John Hargrove at his last known address.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 22, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

[20] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. October 27, 2021

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Kenneth W. Chu
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefits and protection
Choose not to engage in any of these protected activities

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities or to discourage you from engaging in these or other concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL make John Hargrove whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of his discharge to the present, and to include reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate John Hargrove for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge of Jon Hargrove.

WE WILL, within 3 days thereafter, notify John Hargrove in writing that this has been done and that their discharge will not be used against them in any way.

COLART OF AMERICAS, INC. AND STAFF MANAGEMENT GROUP, LLC

(Employers)

Dated_____By_____
(Representative) (Title)
Colart of Americas, Inc.

Dated_____By_____
(Representative) (Title)
Staff Management Group, LLC

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

National Labor Relations Board Region 22
20 Washington Place, 5th Floor
Newark, New Jersey 07102
Hours of Operation: 8:30 a.m. to 5 p.m.
973-645-2100

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/22-CA-252829 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 212-264-0300.